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the individual liability of the appellant, and the action of the lower court in disallowing it as a claim against the company was plainly right.

Upon the whole case we are of opinion that there is no error in the decree complained of, and it must be affirmed. *Affirmed.*

NOTE.—Code of 1887, sec. 1122, providing that "no member of a corporate board shall vote on any question in which he is personally interested other than as a stockholder," is now repealed. Acts 1904, p. 370. There seems to be no statutory provision in lieu of this section.

It would seem that in the absence of a statute the vote of a director upon a measure in which he is personally interested is not *per se void*, and it appears that a contract entered into with a director would be good at law even if his vote was necessary to the adoption of the measure; but this would be closely scrutinized in equity, and the action of the board set aside, unless taken in absolutely good faith. See 10 Cyc. 808, 809, and cases cited.

Sec. 1119, providing that "there shall be no compensation for services rendered by the president or any director, unless it be allowed by the stockholders," is now also repealed. Sec. 1105e, cl. 10, Va. Code Anno., partially in lieu of sections 1118 and 1119, Code 1887, omits this provision. And it appears that this is not incorporated elsewhere in the new Corporation law.

But notwithstanding the repeal of this provision, it would still seem that, independent of any statute, the directors are not entitled to any compensation for any official services as directors. Morawetz Private Corporations (2 Ed.), sec. 580. But the board of directors, without being specially authorized by the stockholders, may fix the compensation of the president now that section 1119 is repealed. 10 Cyc. 921. G. C. G.

BURDETT v. COMMONWEALTH.

Supreme Court of Appeals of Virginia.

November 23, 1904.

[48 S. E. 878.]

CONTEMPT—LIBEL OF COURT—CONCERNING CRIMINAL PROSECUTION—LIBEL AFTER TERMINATION OF CAUSE—POWER TO PUNISH—LIBERTY OF PRESS.

1. Where one who had been convicted of selling liquor without a license published in a newspaper an article charging that the indictments were found under the influence of the judge, and that defendant had been forced to compromise, and charging the judge with vicious motives, it amounted to a libel.

2. On proceedings to punish one for contempt, consisting of the publication of a libelous article concerning the conduct of the judge in a prosecution against the publisher, a defense that, if the term of court had not ended when the

publication was made, the court had directed an adjournment and ordered a proclamation to that effect, was of no merit.

3. A prosecution ends when a judgment imposing a fine has been rendered and satisfied.

4. In dealing with contempts not committed in the presence of the court, the offender must be brought before the court by a rule or some sufficient process.

5. A court may punish for a contempt without issue or trial in any form.

6. Where one convicted on a criminal prosecution published a libelous article concerning the conduct of the judge in the case, the court had power to punish him for a contempt, though the cause had ended by entry of judgment and satisfaction thereof.

7. The power of a court to punish one for contempt, consisting of a libelous article published in a newspaper, is no invasion of the liberty of the press.

Error to Circuit Court, Nelson county.

Proceedings against J. M. Burdett and another to punish them for a contempt. Judgment of the circuit court affirming a judgment of the county court adjudging defendant Burdett guilty of contempt, and he brings error. *Affirmed.*

S. B. Whitehead, for plaintiff in error.

Wm. A. Anderson, attorney general, for the Commonwealth.

KEITH, P.

On the 30th of October, 1903, the county court of Nelson county caused a rule to be issued against J. M. Burdett and M. J. Webb, "to show cause, if any they can, why they shall not be fined and imprisoned for contempt of this court." On November 6th, Burdett filed his demurrer and answer and a motion to have the case heard and determined by a jury; but the court overruled his demurrer and motion, adjudged the defendant guilty of a contempt of court, and sentenced him to pay a fine of $50, and to be confined in jail for a period of 10 days. To this judgment the defendant obtained a writ of error from the circuit court, where it was affirmed, and to the judgment of the circuit court a writ of error was awarded by one of the judges of this court.

It appears that Burdett was an apothecary in Nelson county, and that 12 indictments were found against him for selling at retail ardent spirits and malt liquors without a license. To these indictments he pleaded guilty, and a fine was entered up against him in one case of $40, and costs in the other cases, amounting in the ag-

gregate to $75.51, which was paid to the sheriff of Nelson county on October 27, 1903.

On October 30, 1903, an article appeared in the Nelson County Times newspaper, signed by Burdett, in which he arraigns the conduct of the judge of the county court in a most severe and offensive manner. He charges substantially that the grand jury which found the indictments acted under the dictation and constraint exercised over them by the judge; that under his influence twelve indictments were found, when the question of guilt or innocence could have been established by making one offense a test case; that he had wished to vindicate himself before the public, but had been forced to compromise the prosecutions against him, and to pay the fine and costs which had been imposed. He charges the judge with not only having acted towards him in a harsh and arbitrary manner, but that his conduct was actuated by vicious and corrupt motives.

There can therefore be no doubt that the plaintiff in error was guilty of a gross and insulting libel, and it remains for us to consider whether in the judgment rendered by the county court, punishing the act as a contempt, there was any error of law for which it should be reversed.

The contention of the plaintiff in error is that at the time of the publication the term of the county court of Nelson county had ended; that, if it had not ended, the court had directed an adjournment, and had ordered the sheriff to make proclamation to that effect; and, thirdly, that the cases of the Commonwealth against J. M. Burdett were ended, and the fines paid, before the alleged contempt was committed.

With respect to the first contention, it is sufficient to say (conceding the circumstances to be material) that the term of the court had not ended, as the record proves; and, with respect to the second, that it can hardly be considered a sufficient defense to the charge against him that the plaintiff in error had made a mistake with respect to a fact which had no bearing upon his guilt or innocence of the offense charged, but only upon his immunity from punishment. It is a plea by way of confession and avoidance. "It may be true," says the plaintiff in error, "that I was guilty of a contempt of court when I committed the act, but I thought the court had adjourned, and that under the law I could not be punished. I find that I committed a blunder, and I ask to be permitted to go free on that ac-

count." Such a plea could scarcely be received with favor by a court of justice. The first two assignments of error are therefore overruled.

With respect to the third, we are of opinion that the cases of the Commonwealth against Burdett had ended before the publication of the card. They had been tried, judgments had been rendered and satisfied, and being criminal prosecutions, could not have been re-opened at the instance of the Commonwealth.

The learned attorney general properly concedes that "there are a large number of cases and authorities outside of Virginia upon which counsel for plaintiff in error can fairly rely in his advocacy of his contention" that the courts are without authority to punish as a contempt of court a publication with respect to an ended cause. The law, as maintained by these cases, is thus stated in volume 7, p. 59, A. & Eng. Encyc. of Law (2d ed.): "A slanderous and libelous publication concerning the judge in relation to an act already done or a decision rendered cannot be punished by the court as contempt. However criminal the publication may be, it lacks that necessary ingredient to constitute a contempt, of tending to prejudice the cause, or to impede its progress." But this view omits all allusion to that kind of contempt which consists of scandalizing and defaming the court itself. To ascertain the law of this state in this respect, we shall examine into the common law upon the subject.

We shall make no inquiry into the general power of courts to punish contempt summarily. That subject was fully considered in *Carter* v. *Commonwealth*, 96 Va. 791, 32 S E. 780, 45 L. R. A. 310, and the conclusion was reached that "there is an inherent power of self-defense and self-preservation in the courts of this state created by the Constitution. This power may be regulated by the Legislature, but cannot be destroyed, or so far diminished as to be rendered ineffectual. It is a power necessarily resident in and to be exercised by the court itself, and the Legislature cannot deprive such courts of the power to summarily punish for contempts by providing for a jury trial in such case."

Coming, then, to the precise point in judgment, in *Roach* v. *Garvan*, 2 Atk. 471, known as the *"St. James Evening Post Case,"* Lord Chancellor Hardwicke said: "There are three different sorts of contempt. One kind of contempt is scandalizing the court itself.

There may be likewise a contempt of this court in abusing parties who are concerned in causes here. There may be also a contempt of this court in prejudicing mankind against persons before the cause is heard. There cannot be anything of greater consequence than to keep the streams of justice clear and pure, that parties may proceed with safety both to themselves and their characters."

Blackstone's Commentaries, vol. 4, p. 285, defines contempt to consist, among other things, in "speaking or writing contemptuously of the court or judges acting in their judicial capacity; by printing false accounts of causes depending in judgment; and by anything, in short, that demonstrates a gross want of that regard and respect which, when once courts of justice are deprived of, their authority (so necessary for the good order of the kingdom) is entirely lost among the people."

In the Cyc. of Law and Procedure, vol. 9, p. 6, a constructive contempt is stated to be "an act done, not in the presence of the court, but at a distance, which tends to belittle, to degrade, or to obstruct, interrupt, prevent, or embarrass the administration of justice."

Barton, in volume 2 (2d ed.) p. 774, of his Law Practice, is to the same effect. "Contempt of court is a disobedience to the court, or an opposing or despising the authority, justice, or dignity thereof."

Wyatt v. *The People,* 17 Colo. 253, 28 Pac. 961; *In re Dill,* 32 Kan. 669, 5 Pac. 39, 49 Am. Rep. 505; *Cartwright's Case,* 114 Mass. 230.

The subject has recently been investigated by the Supreme Court of Missouri in *State* v. *Shepherd,* 76 S. W. 79. That court had rendered a judgment in the suit of *Oglesby* v. *Missouri Pac. R. Co.,* 76 S. W. 623, and the opinion and judgment of the court had been attacked in a most acrimonious article in a newspaper. Upon a rule to show cause the whole subject of contempt, at common law and in this country, is examined, a multitude of decisions considered, and the conclusion reached that at common law one class of contempt consisted in scandalizing the court itself, and need not relate to a pending suit. It may be observed that in the judgment rendered by the Supreme Court of Missouri, which was the subject of animadversion, the judges were divided, four of them uniting in the judgment which was the subject of criticism, and three of them dissent-

ing, while in the judgment upon the proceeding for contempt the court was unanimous.

In *Dandridge's Case,* 2 Va. Cas. 417, Judge White, in his opinion, says: "That to scandalize a court by speaking or writing, either in its presence or in its absence, is a high contempt; and how can a court be scandalized except by scandalizing the judges, or some one of the judges, who sit in it? A court, apart from its judges, exists only in abstract idea, in contemplation of law, and, viewed thus apart from them, it has not, it cannot have, any moral character to be scandalized. But let its judges be considered as corrupt cowards, when acting in their judicial capacity, and it is instantly covered with opprobrium and contempt." Judge Dade, delivering an opinion in the same case, says: "Shall a judge be called independent who is unavoidably placed in a situation in which he comes in conflict with the jealousies and resentments of those upon whose interests he has to act, and be reduced to the alternatives of either submitting tamely to contumely and insult, of resenting it by force, or resorting to the doubtful remedy of an action at law? In such a state of things it would rest in the discretion of every party in court to force the judge either to shrink from his duty or to incur the degradation of his authority, which must unavoidably result from the adoption of either of the above alternatives. To suppose that the personal character of the judge would be a sufficient guaranty against this is to imagine a state of society which would render the office of the judge wholly unnecessary."

In *State* v. *Morrill,* 16 Ark. 384, the court says: "By the common law, courts possessed the power to punish, as for contempt, libelous publications upon their proceedings, pending or past, tending to degrade the tribunals, destroy that public confidence and respect for their judgments and decrees so essential to the good order and well-being of society, and to obstruct the free course of justice."

In *Pryor's Case,* 18 Kan. 72, 26 Am. Rep. 747, the court finally decided the case, and the attorney for the losing party wrote a letter to the judge, saying the decision "is directly contrary to every principle of law governing injunctions, and everybody knows it. I believe. . . . It is my desire that no such decisions or orders shall stand unreversed in any court I practice in." The court held that it was a criminal contempt, fined him $50, and suspended him

from practice until the fine was paid, and the Supreme Court sustained the judgment.

In *Woolley's Case,* 11 Bush. 95, an attorney, on a motion for a rehearing, charged "that the court had overlooked the facts of the case; that it had assumed facts having no place in the proof, and ignored others which stood out on every page of the record; that it was careless and indifferent to the rights of a litigant, and that the result of this carelessness and indifference was a ruinous, disastrous, and unjust judgment against a party wholly innocent of all offense. The court pronounced the offense to be of a nature too grave to be silently overlooked. The defendant was cited for contempt, and disclaimed under oath any intention to commit a contempt, and in consideration of this condition his fine was assessed at the nominal sum of $30.

In *Chadwick's Case,* 67 N. W. 1071, the defendant, an attorney for the losing party in a case that had been decided by the Supreme Court of Michigan, wrote and published an article in the Port Huron News, criticising the decree, and in it charged the judge with unfairness and improper conduct. The Supreme Court held it to be a contempt of court, and that the power to punish for contempt existed as well after a case was finally disposed of as where it was still pending.

It may be well to observe that the substantial difference between a direct and a constructive contempt is one of procedure. Where the contempt is committed in the presence of the court, it is competent for it to proceed upon its own knowledge of the facts, and to punish the offender without further proof, and without issue or trial in any form. *Ex parte Terry,* 128 U. S. 289, 9 Sup. Ct. 77, 32 L. Ed. 405; *Ex parte Wright,* 65 Ind. 508; *State* v. *Woodfin,* 27 N. C. 199, 42 Am. Dec. 161.

In dealing with indirect contempts—that is, such as are committed not in the presence of the court—the offender must be brought before the court by a rule or some other sufficient process; but the power of the court to punish is the same in both cases.

In the nature of things, why should not defamatory and scandalous criticisms upon a court or judge, with respect to an ended cause, be punished as a contempt? It is true that it can no longer injure the particular litigant, but it degrades the administration of justice by bringing the courts and judges into disrepute.

In *Commonwealth* v. *Dandridge,* 2 Va. Cas. 417, the court said: "Upon this part of the subject, and in reference to cases which have an indirect bearing on the present question, a distinction is attempted for which I can find neither reason nor authority. It is said that the attaching power may be exercised for contempts touching the prospective conduct of the judge, but not so far as to touch his past conduct. In reason, I see but one pretense for this distinction. Threats and menaces of insult or injury to a judge in case he shall render a certain judgment may be considered as impairing his independence and impartiality in the particular case to which the threats refer. And, if the power of punishment stop here, a curious consequence may ensue. A man may be attached for threatening to do that for which he could not be attached when actually done. One says of a judge, 'If he render a certain judgment against me, I will insult or beat him.' For this he may be attached. But if (the judgment having been rendered) this insult be actually offered, an attachment no longer lies, because the contempt is in relation to the past conduct of the judge, and to a case no longer pending. A recurrence to original principles—the only true test—by demonstrating that the weight, authority, and independence of the court may be equally assailed either way, will prove that this distinction is merely ideal."

We therefore conclude with the court in *Morrill's Case* that, "by common law, courts possessed the power to punish, as for contempt, libelous publications, of the character of the one under consideration, upon their proceedings, pending or past, upon the ground that they tended to degrade the tribunals, destroy that public confidence and respect for their judgments and decrees so essentially necessary to the good order and well-being of society, and most effectually obstructed the free course of justice."

Nor do we think that the summary punishment, as for contempt, of a newspaper article, constitutes an invasion of the liberty of the press. With respect to this feature of the case, it can, of course, make no difference whether the article refers to a pending or a past transaction.

In *State* v. *Frew & Hart,* 24 W. Va. 417, 49 Am. Rep. 257, it is held that a publication in a newspaper with reference to a case pending and undetermined in the Supreme Court of Appeals, charging three of the four judges of the court with attending a political

caucus more than a year before, and advising the action out of which the case arose, promising the caucus to hold its action legal and proper, and charging the court with agreeing to decide the case before an approaching political convention for political purposes, was a contempt of court, for which it might be summarily punished.

And in *State* v. *Morrill, supra,* it is said "that any citizen has a right to comment upon the proceedings and decisions of a court, to discuss their correctness, and the fitness or unfitness of the judges for their stations, and the fidelity with which they perform the important trusts reposed in them; but he has no right to attempt, by libelous publications, to degrade the tribunal, for such publications are an abuse of the liberty of the press, for which he is responsible." In this statement of the law we heartily concur. *State* v. *Shepherd, supra.*

Such being the common law applicable to the case, the courts of Virginia are bound to administer it until it has been changed by competent authority.

There is a reasonable jealousy felt by the public with respect to the exercise of the summary power to punish for contempt. Especially is this true as to contempts which consist in "scandalizing the court." There is a natural apprehension that personal considerations may influence and bias the judgment of the court. It is, indeed, a delicate matter, and one with respect to which the courts should act with the utmost caution and reserve. That they have done so in this commonwealth, its judicial history fully proves. But while the duty is a delicate one, it is one which cannot be shirked, and the faithful discharge of which is essential to the administration of justice. The courts are the courts of the people; the judges are the servants of the people; and it is their highest duty to the people to see that the streams of justice are kept pure and uncontaminated. If the charges brought in the article which constitutes the contempt in this case be true, then the judge of the county court of Nelson deserves the scorn of all good men. In defaming him the county court, and justice as therein administered, were brought into utter disrepute.

Twelve indictments were found against the plaintiff in error for selling intoxicating liquors without a license. He claims in his card that he was innocent of the charge. He saw fit to plead guilty, He had the same opportunity that is afforded to any citizen to ap-

pear before the tribunals of his country and to make his defense. Upon his trial he could have appeared in person or by attorney. Everything pertinent to the case would have been given to the jury and to the public. Instead of resorting to this means of vindicating his character, he has chosen to plead guilty to the indictments against him, and to resort for his vindication to a defamatory criticism of the court, which rests upon his unsupported statement.

Upon the whole case we are of opinion that the judgment of the circuit court should be affirmed. *Affirmed.*

NOTE.—In the above case, after reviewing the cases on the subject of contempt "in the presence of the court" (direct contempt) and contempt by "scandalizing the court" (constructive contempt), the court says:

"It may be well to observe that the substantial difference between a direct and a constructive contempt is one of procedure. Where the contempt is committed in the presence of the court, it is competent for it to proceed upon its own knowledge of the facts, and to punish the offender without further proof, and without issue or trial in any form. *Ex parte Terry*, 128 U. S. 289, 9 Sup. Ct. 77, 32 L. Ed. 405; *Ex parte Wright*, 65 Ind. 508; *State* v. *Woodfin*, 27 N. C. 199, 42 Am. Dec. 161.

"In dealing with indirect contempts—that is, such as is committed not in the presence of the court—the offender must be brought before the court by a rule or some other sufficient process; but the power of the court to punish is the same in both cases."

On the power of a notary to punish for contempt, see note to *Re George A. Hunron*, 36 L. R. A. 822; *contempt by refusing to testify: Re John M. Clayton*, 13 L. R. A. 66; and *general subject of contempt*: note to *Wells* v. *Commonwealth*, 21 Gratt. (Va. Rep. Anno.) 500; Rose's Notes on *Ex parte Terry*, 128 U. S. 289; note to *Oregon* v. *Kaiser*, 8 L. R. A. 584; note to *Percival* v. *State*, 50 Am. St. Rep. 568; and Vol. 10 Cent. Dig. secs. 151–153. G. C. G.

MOORE v. BALTIMORE & O. R. CO.

Supreme Court of Appeals of Virginia.

November 23, 1904.

[48 S. E. 887.]

CARRIAGE OF LIVE STOCK—DELAY IN DELIVERY—PLEADING—INSTRUCTIONS—REVIEW.

1. A shipper of live stock cannot recover damages for delay in delivery of the stock where it is consigned in the name of shipper and he was not present to demand delivery, and delivery was made to his employés immediately on the carriers' ascertaining their authority to receive it.